

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

MILLENNIUM TGA, INC.

Plaintiff

v.

JOHN DOES 1-939

Defendants.

Case No. 4:11-CV-04501

Judge: Hon. Vanessa D. Gilmore

RENEWED MOTION FOR ATTORNEYS FEES

COMES NOW, Defendant John Doe (I.P. Address 50.46.205.98), by and through undersigned counsel, and moves this Honorable Court for an Order awarding costs and sanctions against Plaintiff Millennium TGA, Inc.

Defendant John Doe (I.P. Address 50.46.205.98) originally made this motion prior to this Court's decision amending its original judgment to a final judgment with prejudice. (Dkt 134). Co-defendant John Doe (I.P. Address 184.155.204.241) has filed another motion for fees setting forth Plaintiff's additional misconduct since this Court's original dismissal of the case. Accordingly, Defendant John Doe (I.P. Address 50.46.205.98) **joins** in Co-defendant John Doe (I.P. Address 184.155.204.241)'s Motion for Attorneys Fees and Costs (Dkt 136) and again says as follows:

I. BACKGROUND

On December 7, 2011, Plaintiff Millennium TGA, Inc. originally filed its Complaint in the District Court for the District of Columbia (DCD Case No. 1:11-cv-2176) alleging that several hundred "John Does" violated Millennium's purported copyright to a movie entitled "Shemale Yum – Jenna Comes

1 A-Knocking,” (“the Video”). See Exhibit A. The Video appears to relate to sexual
2 relations with a transsexual individual. In apparent forum shopping, Millennium
3 dismissed its originally filed complaint in the District of Columbia as soon as a
4 judge was assigned on December 16, 2011. See Exhibit B.

5
6 Millennium refiled its complaint in the Southern District of Texas four days
7 later on December 20, 2011. Millennium filed a motion for early discovery
8 ostensibly to enable Millennium to discover the defendants’ identifying
9 information for the purpose of naming them in the Texas Action. The Southern
10 District of Texas granted that motion, and Millennium issued subpoenas to
11 defendants’ several Internet Service Providers (ISPs), including Defendant’s ISP,
12 Frontier Communications. Millennium used an Internet Protocol (IP) address to
13 identify each defendant; Defendant was identified by IP address 50.46.205.98.

14 To avoid the harassment that would have resulted from being wrongfully
15 associated with the type of claim being made by Millennium, Defendant incurred
16 substantial costs to file a Motion to Quash or Modify the subpoena that was issued
17 out of the District of Columbia. (DCD Case 1:12-mc-00587). See Exhibit C. That
18 motion was filed on Nov. 8, 2012. As far as Defendant is aware, nothing further
19 has occurred in that matter.

20 True to form, Millennium has again demonstrated that these countless
21 lawsuits are nothing but an improper business model, based entirely on abuse of
22 process, and designed to misuse the legal system to extort money from innocent
23 citizens with no intent to actually litigate a legitimate dispute. Millennium has
24 again voluntarily dismissed this case against all defendants. Dkt 122.

25 II. MOTION FOR COSTS AND FEES

This Court has the authority to award costs and fees to the prevailing party

1 and against Millennium pursuant to 17 USC § 505. For the reasons set forth below,
2 Defendant is one of the prevailing parties in this action, and is entitled to an award
3 of costs and fees.
4

5 A. Defendant Is A Prevailing Party

6 Defendant has prevailed on the merits against Millennium. A plaintiff may
7 dismiss an action without a court order by filing a notice of dismissal before the
8 opposing party serves either an answer or a motion for summary judgment. Fed. R.
9 Civ. P. 41(a)(1)(A). “Unless the notice ... states otherwise, the dismissal is without
10 prejudice.” (Fed. R. Civ. P. 41(a)(1)(B).) “But if the plaintiff previously dismissed
11 any federal or state court action based on or including the same claim, a notice of
12 dismissal operates as an adjudication on the merits.” *Id.* (emphasis added.); *Burnett*
13 *v. Perry Mfg.*, 151 F.R.D. 398, 403-404 (D. Kan. 1993).

14 Seeking to avoid a disfavorable judgment on the merits against what it knew
15 to be an innocent Defendant, Millennium dismissed its second action in an effort to
16 “cut its losses and run out of court, using Rule 41 as an emergency exit.” *Cooter &*
17 *Gell v. Hartmarx Corp.*, 496 U.S. 384, 390 (1990). However, the policy and
18 purpose of Rule 41(a)(1) was expressly designed by Congress to limit a plaintiff’s
19 ability to repeatedly dismiss an action and curb abuses of the judicial system. *Id.* at
20 397; see also *Poloron Products, Inc. v. Lybrand Ross Bros. & Montgomery*, 534
21 F.2d 1012, 1017 (2d Cir. 1976)(the primary purpose of the "two dismissal" rule is
22 to prevent an unreasonable use of the plaintiff's unilateral right to dismiss an action
23 prior to the filing of the defendant's responsive pleading.)

24 In civil actions involving John Doe defendants, Rule 41 orders of dismissal
25 in previously related cases are effective as dismissals against those individuals
even though they had not yet been identified. See, e.g., *Joseph Andrews v. John*

1 *Doe Arresting Officer*, CV-08-2052-PHX-MHM (MHB), (D. Az. 2008). See also
2 *Goel v. Heller*, 667 F. Supp. 144, 151 (D. N.J. 1987) (stating that “One can not
3 invoke “John Doe” to avoid *res judicata* and relitigate claims ad nauseum when in
4 large measure the acts and statements complained of” were previously litigated.)

5
6 This action was originally brought in the District Court for the District of
7 Columbia as Case No. 1:11-cv-2176; that case was voluntarily dismissed pursuant
8 to Fed. R. Civ. P. 41(a). See Exhibit A. Millennium then brought the same action
9 against the same defendants in a second action in this Court. Millennium has now
10 twice voluntarily dismissed the same action against the same defendants, including
11 this Defendant. Accordingly, as set forth in Fed. R. Civ. P. 41(a) Millennium's
12 second voluntary dismissal operates as an adjudication on the merits, thus making
13 Defendant a prevailing party.

14 B. The Copyright Act Authorizes Attorneys Fees To Prevailing Defendants

15 17 U.S.C. § 505 authorizes an award of attorneys fees to the prevailing party,
16 which includes the prevailing defendant. A prevailing Defendant is entitled to a
17 heightened presumption of an award of attorney’s fees. Judge Posner once wrote
18 “[w]hen the prevailing party is the defendant, who by definition receives not a
19 small award but no award, the presumption in favor of awarding fees is very
20 strong.” *Assessment Technologies of Wi, LLC. v. Wire Data, Inc.*, 361 F.3d 434, 437
21 (7th Cir 2004). Judge Posner wrote that “without the prospect of such an award,
22 the party might be forced into a nuisance settlement or deterred altogether from
23 enforcing his rights” because the party “could not obtain an award of damages
24 from which to pay his lawyer—no matter how costly it was for him to defend
25 against the suit.” *Id.*

Accordingly, as a prevailing defendant in this copyright action, public policy

1 urges that Defendant be awarded a reasonable attorneys fee for defending against
2 this meritless action in at least two different jurisdictions.
3

4 C. Fair Estimate Of The Value Of The Attorneys Fees

5 Pursuant to Fed. R. Civ. P. 54(d)(2)(C), this Court may decide the issue of
6 liability for attorneys fees before receiving submissions on the value of the
7 services. Pursuant to Fed. R. Civ. P. 54(d)(2)(B), Defendant submits that a fair
8 estimate of the reasonable attorneys fee incurred through this date is \$ 11,752.50.
9 Costs incurred through this date are \$ 240.00.

10 **III. CONCLUSION**

11 For all the foregoing reasons, Defendant John Doe (IP Address
12 50.46.205.98) should be awarded full costs and attorneys fees as the prevailing
13 party under the provisions of the Copyright Act.
14

15 Dated: March 5, 2013.

Respectfully submitted,

17 /s/ John Whitaker

18 John Whitaker, WSBA No: 28868

WHITAKER LAW GROUP

1218 Third Avenue, Suite 1809

Seattle, Washington 98101

20 Phone (206) 436-8500

21 Fax (206) 694-2203

john@wlawgrp.com

22 Attorney for Defendant John Doe

23 (I.P. Address **50.46.205.98**)
24
25

CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below, the foregoing document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing, and paper copies will be served via first-class mail to those indicated as non-registered participants

Date: March 5, 2013

/s/ John Whitaker